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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Appellants

VS.

LEONARD PAUL HODORY,
Appellee

On Appeal from the United States District Court
for the Northern District of Ohio, Eastern Division

BRIEF OF REPUBLIC STEEL CORPORATION AS AMICUS CURIAE

WALTER J. MACKEY
Mackey, Mackey & Saad
1480 West Lane Avenue
Columbus, Ohio 43221
(614) 486-1655
Attorney for
Republic Steel Corporation
as Amicus Curiae

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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BRIEF OF REPUBLIC STEEL CORPORATION AS AMICUS CURIAE

This Brief is submitted on behalf of Republic Steel Corporation as Amicus Curiae pursuant to leave granted by the Court on October 4, 1976. It supports the position of the Appellants, Ohio Bureau of Employment Services and Albert G. Giles and seeks such further relief for Republic Steel Corporation as the Court may deem appropriate.

I. STATEMENT OF THE CASE

This case involves the constitutionality of Sec. 4141.29 (D)(1)(a) of the Ohio Revised Code. This Section, (quoted in its entirety in the Appendix to Appellant's Jurisdictional statement at page 34), denies benefits to a claimant if his unemployment is due to a labor dispute (other than a lockout) at any factory, establishment, or other premises, located in this or any other state, owned or operated by the employer by whom he was last employed. The disqualification continues so long as his unemployment is due to such labor dispute.

As a result of a national strike in 1974 by the United Mine Workers at coal mines owned and operated by Republic Steel Corporation and United States Steel Corporation, these companies were forced to lay off large numbers of workers in their steel plants in Ohio.

Claims for unemployment benefits were filed with the Ohio Bureau of Employment Services and the claims of Hodory, the Appellee in this case, along with some 1,250 other claimants were denied by the Administrator on the ground that their unemployment was due to the labor dispute.

A Legal Aid Organization filed the present class action on behalf of Appellee and the other some 1,250 claimants who were similarly situated, whose claims for unemployment benefits were denied, claiming that the provision denying benefits contained in Sec. 4141.29(D)(1)(a) is unconstitutional by denying equal protection of the laws guaranteed by the 14th Amendment to the United States Constitution.

Neither Republic Steel Corporation nor United States Steel Corporation was named a defendant in

this action in spite of the fact that they are interested parties in these cases pending before the Board of Review and are necessary parties in any further action in these cases in the state courts.

The United States District Court convened a three judge panel which heard the case and in a Memorandum Opinion and Order on March 5, 1976 held:

(1) That a class action was proper,

(2) That the defendants had failed to demonstrate that the classification contained in 4141.29(D)(1)(a) denying benefits for unemployment due to a labor dispute did not violate the Equal Protection clause of the 14th Amendment of the United States Constitution, and

(3) That the defendants had failed to demonstrate that the application of Sec. 4141.29 (D)(1)(a) bears a real and substantial relation to a legitimate state purpose, and therefore as applied in this case to deny benefits to individuals who were unemployed through no fault of their own and who neither participated in nor benefited from the labor dispute involving another union, violates claimant's right to due process under the 14th Amendment and 42 U.S.C. Sec. 1983.

II. REPUBLIC STEEL CORPORATION HAS A SUBSTANTIAL FINANCIAL INTEREST IN THIS CASE.

If the decision of the Three Judge District Court is allowed to become final, unemployment benefits will be paid to some five hundred eighty of Republic Steel's

employees who are included as a part of the class with Hodory, Appellee herein.

These claims for benefits were denied by the Administrator of the Ohio Bureau of Employment Services and are now pending on appeal with the Board of Review of the Bureau but action by the Board is being stayed pending a final decision in this case.

The period involved consists of nine weeks from November 11, 1974 through January 11, 1975 during which there was unemployment due to a strike in the coal mines owned and operated by Republic Steel Corporation.

Only an estimate of the amount of money involved in these claims can be made based upon the following facts and assumptions.

(1) The average Ohio weekly benefit check in the steel industry is $98.

(2) There were 580 claims filed by employees of Republic Steel involved in this class action whose claims were denied. Multiplying the 580 claims by $98, times eight weeks (allowing for one week waiting period) results in $454,700.

Under the experience rating provisions of the Ohio law (Sec. 4141.24(D)(1) R.C.) unemployment benefits paid to Republic Steel's employees are charged to its account with the Bureau and are paid for by Republic through an increase in its state payroll tax for unemployment compensation.

Republic Steel Corporation is made an interested party to these cases now pending with the Board of Review and under Ohio Revised Code Section 4141.28(O) becomes an Appellee in any further action in the state courts.

The impact of the decision in this case in future cases which may arise is purely speculative, but given the realities of past experience in this area of labor disputes, it is safe to say that the results will be important and far reaching.

III. ARGUMENT

Forty years ago this court, in holding constitutional Title IX of the Social Security Act and the Alabama Unemployment Compensation law, removed the last obstacle in the development of a comprehensive system of state unemployment insurance laws in the United States.

Although it was argued that the tax mechanism in Title IX encouraged, enticed or induced (depending on the individual's viewpoint) the states to pass unemployment compensation laws, it cannot be denied that the decisions by this court properly interpreted the intention of the Congress that a state was free to adopt the type of law which best served the interest of its citizens.

All states have adopted unemployment compensation laws and no two are the same. They *are* all state laws, adopted by state legislatures, administered by state employees and the benefits payable under such laws are financed by a state payroll tax on employers.

For the first time since that historic year of 1937, a Federal Court has held unconstitutional a provision in a state law denying unemployment benefits for unemployment due to a labor dispute.

According to the "Jurisdictional Statement" by the Appellants, this decision by the Federal District Court was based upon a hearing on the jurisdictional question without opportunity to submit evidence on the merits and without notice to U.S. Steel Corporation

or Republic Steel Corporation whose employees were involved and who were "interested parties" in a pending proceeding on this issue before the Board of Review of the Ohio Bureau of Employment Services. (Page 8 Jurisdictional Statement)

A. THE PROVISION OF R.C. 4141.29(D)(1)(a) DENYING BENEFITS TO CLAIMANTS UNEMPLOYMENT IS DUE TO A LABOR DISPUTE IS A REASONABLE EXERCISE OF THE POLICE POWER OF THE STATE.

The first time this court spoke on the subject of the right of choice of beneficiaries by a state legislature in the field of unemployment compensation was in the opinion delivered by Mr. Justice Stone in May, 1937 in holding the Alabama Unemployment Compensation Act constitutional. *Carmichael v. Southern Coal Co., et al.*, 301 U.S. 495, 57 S. Ct. 868 (1937).

The opponents of the law contended that the choice of beneficiaries was so arbitrary and discriminatory as to infringe the 14th Amendment and deprive the statute of any public purpose.

The court rejected this argument and held that a state unemployment system "is not bound to occupy the whole field."

In all states there are conditions and circumstances where the state legislatures have elected not to allow unemployment benefits. For example, when these laws were first enacted, employees of employers of less than eight employees were excluded as were agriculture workers, employees of state and local governments, etc. A three weeks waiting period was required in most states.

Over the years, refinements have been made by the various states and coverage of programs extended to

additional groups of workers, all within the framework of the Constitution.

On the same day that this court announced its decision in the *Carmichael* case, (May 24, 1937) it also decided the case of *Steward Machine Co. vs. Davis*, 301 U.S. 548, 57 S.Ct. 883, upholding the validity of the federal unemployment tax under Title IX of the Social Security Act.

On the subject of classification and exemptions Mr. Justice Cordizo delivering the opinion of the Court stated:

> "The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. This is held in two cases passed upon today in which precisely the same provisions were the subject of attack, the provisions being contained in the Unemployment Compensation Law of the State of Alabama." (Citations omitted)

The *Steward Machine Co.* decision stresses the fact that under the Federal Social Security Act the taxpayer and the states are not coerced; that the powers of the states are unimpaired; and that in fact a state is not bound to keep its law in effect.

There is ample evidence therefore that Congress intended that a state, in adopting an unemployment compensation law was free to fit its law to the particular conditions existing in the stat , which in the discretion of the state legislature, l st served the interest of its citizens.

At the time the validity of the Alabama Unemployment Compensation case was decided by this court in 1937, that law contained the following provision with respect to the denial of benefits for unemployment caused by a labor dispute:

> "Sec. 6 . . . an employee shall not be eligible for benefits for any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was last employed."

It should be noted that when the constitutionality of the Alabama law was upheld by this court, there were no exceptions to the disqualification in the above provision because such employee was not participating, interested in or financing the labor dispute or did not belong to the same union which was a party to the dispute. If his unemployment was "directly due to the dispute" the denial of benefits was absolute. Refinements only came later by legislative action and not through constitutional compulsion.

The first Ohio unemployment compensation law enacted in December, 1936, contained a similar provision:

> "Sec. 1345-6 c, O.G.C. No benefits shall be payable to any individual who has lost his employment or has left his employment by reason of a strike in the establishment in which he was employed, as long as such strike continues; . . ."

Subsequent legislatures amended this Ohio provision substituting "labor dispute" for "strike," making an exception to the disqualification in the case of a "lock out" by the employer and expanding the meaning of "establishment" to include any factory, establishment

or other premises located in Ohio or any other state owned or operated by the employer. The basic concept of denying benefits to employees whose unemployment is due to a labor dispute has remained intact up to the present time.

The principle of law involved in this case is the right of a state legislature to refine and change these classifications of beneficiaries under its unemployment compensation program in a reasonable manner.

B. THE OHIO LABOR DISPUTE PROVISION HAS REMAINED RELATIVELY INTACT SINCE ITS INCEPTION IN 1936 AND HAS BEEN CERTIFIED EACH YEAR BY THE U.S. SECRETARY OF LABOR AS IN CONFORMITY WITH THE FEDERAL LAW.

Since the original unemployment law was first adopted, the validity of the labor dispute disqualification has not been seriously challenged and has been successfully administered by the state agency in the many cases coming before it.

Although this court has not heretofore, to our knowledge, had the question of the validity of this provision of the Ohio law before it, other actions by the court would seem to affirm the views expressed by the court in 1937 as to the right of a state legislature to choose a reasonable classification of beneficiaries for unem-

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(Note: Effective December 2, 1975, the Ohio legislature further amended this provision of the law confining the disqualification to employees at the establishment in which the labor dispute existed but lifting the disqualification of employees in other establishments if it is shown that they were not financing, participating in, or directly interested in the labor dispute. Not being retroactive in effect, this recent amendment is not pertinent to a determination of the instant case).

ployment compensation without interference by the federal government. For example, in the case of *Abernathy v. Eastern Airlines*, 259 N.C. 190, 130 S.E. 2d, 292 (1963) this court denied certiorari in an appeal from the decision of the Supreme Court of North Carolina on December 2, 1963, 375 U.S. 161.

The North Carolina Supreme Court had before it the question of the validity of a provision in the North Carolina Unemployment Compensation law which denies benefits in labor dispute cases under situations almost identical to those in the instant case.

The *Abernathy* case arose in 1963 several months after the North Carolina General Assembly amended its labor dispute provision, effective July 1, 1961, to read as follows:

> "An individual shall be disqualified for benefits . . .
> "(4) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. Provided, that an individual disqualified under the provisions of this subdivision shall continue to be disqualified thereunder after the labor dispute has ceased to be in active progress for such period of time as is reasonably necessary and required to physically resume operations in the method of operating in use at the

> plant, factory, or establishment of the employing unit." (G.S. 96-14(4) N.C.)

It is important to note that at the time the instant case arose the Ohio law provided that no individual may serve a wait-period or be paid benefits for any week with respect to which the administrator finds that:

> "(a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor disputes." (Sec. 4141.29(D)(1)(a) Ohio Revised Code.)

The similarity of purpose of the two laws is obvious even though slightly different language is employed.

It is also important to note that prior to its amendment effective July 1, 1961, the North Carolina labor dispute provision did not deny benefits if it were shown that the individual was not participating, financing or interested in the labor dispute.

Approximately a year after its enactment on July 1, 1961, this amendment was challenged in the North Carolina Courts on the grounds that it constituted an unlawful discrimination in violation of the State and Federal Constitutions—the same grounds that are being advanced in the instant case.

The Supreme Court of North Carolina in upholding the validity of the amendment in question stated in pertinent part:

> ". . . in passing the 1961 amendment the North Carolina General Assembly acted within its con-

stitutional powers. 'When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form it own judgment and its action within its range of discretion cannot be set aside because compliance is burdensome' . . . (Citations omitted)

"The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. The further disqualifications contained in the 1961 amendment involves a question of degree and not of principle."

As noted above, this court denied certiorari December 2, 1963. U.S. Sup. Ct. 375 U.S. 161.

Appellee's claim for relief under 42 U.S.C.A. 1983 is not well founded. As stated in the case of *Ortega v. Rogen*, 216 F. 2d. 561, (Cert. denied 349 U.S. 940) (1954) it was held by the U.S. Court of Appeals, Seventh Circuit that 42 U.S.C.A. 1983 only "gives an action for deprivation of due process and not for denial of equal protection." (Citations omitted) This decision further held that "a cause of action arises under this section only when a right created by the Federal Constitution or laws has been violated. Violation of a state law is not sufficient."

The case of *California Department of Human Relations v. Java et al.* 402 U.S. 121, 91 S. Ct. 1347, (1971) had nothing to do with the qualification for benefit rights. This case merely states that once benefits are determined to be due a claimant, benefits should be paid forthwith and should not be suspended upon an appeal being filed, but only after an evidentiary hearing is held and benefits denied as a result of such hearing. The constitutional question was never reached in *Java.*

Recent proceedings in the Congress indicate its continued support of the right of a state legislature in this area of disqualifications. In failing to enact the proposed legislation proposed by President Nixon in 1969, that the states be required to deny unemployment benefits to strikers, Chairman Mills of the House Committee on Ways and Means explained on the floor of the House:

"We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people . . . For example, there are two states . . . which will pay unemployment benefits when employees are on strike . . . If the State wants to do it we believe they ought to be given latitude to enable them to write the program that they want." 115 Cong. Rec. 34106 (1969) *Grinell Corp. v. Hackett*, 475 Fed. 2d. 445 at 455.

Further the Senate Finance Committee Report in explaining H.R. 14705 contained this statement:

"It would not prevent a State from specifying the conditions for disqualification such as, for refusing suitable work, for voluntary quitting, for unemployment due to a labor dispute in the worker's plant, etc. *Grinell*, supra.

C. IN EXERCISING ITS CHOICE OF BENEFICIARIES, THE LEGISLATURE, IN DENYING BENEFITS TO INDIVIDUALS WHO ARE UNEMPLOYED DUE TO A LABOR DISPUTE, EVEN THOUGH SUCH PERSONS ARE NOT ACTUALLY PARTICIPATING IN THE DIS-

PUTE, FULFILLS A LEGITIMATE, REASONABLE AND ESSENTIAL STATE PURPOSE.

The lower court has injected into this case the element of fault on the part of the individual as a necessary showing in order to deny benefits.

On page 8 of its Memorandum Opinion and Order the District Court referring to the disqualification provisions in Sec. 4141.29 of the Ohio law stated:

> "That provision contains a number of clauses which disqualify certain classes of unemployed individuals from receiving benefits. In accordance with the apparent purpose of the enactment each of these classes, except one, disqualify only those individuals who become unemployed through no fault of their own."

The lower court failed to perceive the many other types of unemployment where benefits are denied where "fault" has nothing to do with their ineligibility for benefits. To itemize a few in effect at the time this case arose:

(1) The unemployment of agricultural workers; of domestic workers; of commission salesmen; of independent contractors; of teachers during summer vacation months,

(2) Unemployment due to sickness, inability to work and unavailability for work,

(3) Unemployment of an elected official or other government employee not in the classified service,

(4) Unemployment of an individual employed by his son, daughter or spouse or a person under 18 years of age employed by his father or mother.

(5) For many years—unemployment due to "an Act of God."

Surely it cannot be said that these types of unemployment are due to the "fault" of the individual.

Now comes the Appellee, some forty years after the enactment of this state unemployment compensation law, and asks this court to change the whole concept of its law. Apparently, as they conceive it, there would be a basic, inherent, God given right to benefits for all types of unemployment, unless it is shown that the individual is at fault. Fortunately this has not been the concept of this court and any step in this direction would be unfortunate for the program.

There is no contractual right to benefits in all cases, as stated by this court in the case of *Fleming v. Nestor*, 363 U.S. 603, 610. That case involved a claim for Social Security benefits where the fund is financed in part by a payroll deduction from the employee. This court stated:

> "We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process clause of the Fifth Amendment. . . .
>
> "Particularly when we deal with a withholding of a non-contractural benefit under a social welfare program such as this, we must recognize that the Due Process clause can be thought to interpose a bar *only if the statue manifests a patently arbitrary classification, utterly lacking in rational justification.*" (Emphasis added)

This reasoning should apply with even greater strength to the state unemployment program which

is financed entirely by a tax on the employer's payroll with no contribution by the employee.

We fully recognize the fact that there are situations so violative of rights guaranteed by the Constitution as to warrant intervention by a federal court in a state's proceedings.

Such an area was described in the relatively recent case of *Huffman v. Pursue, Ltd.*, 401 U.S. 592 in which case the court refrained from enjoying a pending proceeding in a state court in a civil case, applying the same principle of abstention it had stated in a criminal case in *Younger v. Harris*, 401 U.S. 37, but then added:

> "*Younger* and its Civil Counterpart which we apply today do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass, or is conducted in bad faith, or where the challenged statute is flagrantly and patently violative of express constitutional prohibitions in in every clause, sentence and paragraph, and in whatever manner and against whomsoever an effort might be made to apply it."

Clearly the present case does not fall into this category of cases justifying intervention described in *Younger*.

An attempt is made to distinguish it from *Younger* because in this case the injunction is against the Board of Review of the Ohio Bureau, a quasi-judicial tribunal whose decision is necessary for an appeal to the state courts.

The Appellees have not exhausted their remedy in the state courts and by pre-judging what the decision in the state courts will be, it is tantamount to denying

jurisdiction by the state courts conferred by the statute.

The action by the lower court is no different in effect from enjoining a proceeding in the court itself, since in either case its jurisdiction has been denied.

We think the more appropriate view in this case is that expressed in *Younger*.

> "This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin proceedings in state courts is not to issue such injunction."

The lower court concedes there are legitimate reasons for the denial of benefits to the unemployed members of the union *involved* in the labor dispute. This is recognition of the fact that the payment of benefits to strikers affects the bargaining process by greatly reducing the economic pressure upon them for reaching an agreement.

The United States District Court, District of Hawaii, recently struck down the Hawaii law that allowed benefits for unemployment due to a strike on the ground that such payments violated the state's obligation to remain neutral in such cases. The court made this pertinent statement:

> "Employer and employees alike have a right to the benefit of every privately furnished economic weapon available in implementing their respective bargaining position in carrying on or opposing a strike.
> . . . Unless . . . there is an overriding state interest, a state may not assist either party in a labor dispute . . ." *Hawaiian Telephone Co. v. State of*

Hawaii Dept. of Labor and Industrial Relations, U.S. Dist. Ct., Dist. of Hawaii, Civil No. 74-140 (10/1/1975.)

This court denied certiorai in the *Abernathy* case supra in which the Supreme Court of North Carolina had upheld the constitutionality of its state law which denies benefits in cases where the unemployment is caused by a labor dispute at another place, either within or without that state, if owned or operated by the same employer and which supplies materials or services necessary to continue the employer's operations — the exact conditions prescribed in that portion of the Ohio law now in dispute. The North Carolina Supreme Court noted that the power of the state's legislature to provide numerous other disqualifications was not challenged and that

> "The further disqualification contained in the 1961 amendment involves a question of degree and not of principle."

No further explanation is needed of the fact that unemployment benefits, paid to an employer's employees during a labor dispute, whether such employees are participating in the dispute or are merely unemployed because of the dispute, are charged to the employer's experience rate account with the state agency administering the law.

It is also well established that under this system of experience rating, employers are required to contribute to the state unemployment fund, in the form of a payroll tax, approximately the amount of benefits that are paid to their unemployed workers, up to the maximum rate which presently is 4.8% in Ohio. This is one of the reasons the employer is made an "interested party" in all proceedings where the right to benefits are involved. This financial stake in the payment of benefits also provides the employer with the incentive to reduce unemployment, to stablize his employment and to assist in policing a broad and complex system which is open to abuse.

In our memorandum in support of our motion for leave to file this brief as Amicus Curiae, we stated that if the state imposes an increased payroll tax on an employer because of a labor dispute with which he otherwise would not be burdened, it is not remaining neutral. This is true whether the increased tax results from benefits being paid to those employees actually participating in the dispute or from benefits to other of his employees not participating, but whose unemployment is due to the dispute. It is the financial hardship which the state would impose upon the employer which weakens or destroys his ability to bargain on an equal basis, a result which violates the national policy of free collective bargaining embodied in the National Labor Relations Act. (29 U.S.C. 161 et seq.)

For example, take the case of an employer who has two or more unions representing employees in his plant. One of these unions — the smaller one — goes out on strike necessitating closing down the entire plant. If the employer is burdened by paying the cost of unemployment benefits to the large group who may not be participating in the dispute, but who are unemployed because of the strike, then there comes a time — and not too long a time — when those at the bargaining table representing the employer are confronted with the fact that the cost of unemployment benefits exceeds the costs of the items at the bargaining table. The result is obvious — no free collective bargaining.

It is argued that the members of the non-striking union were not at fault but were innocent bystanders. We respond by asking if the employer was at fault? He might also be the innocent bystander.

If this issue is to be determined by the "fault" or "lack of fault" of the parties to a labor dispute, then the state administrative agency would be forced to analyze the merits of every labor dispute in order to place blame, an area in which the state agency has no jurisdiction and should not attempt to invade.

It is also argued that employees who are unemployed due to a labor dispute but who are not interested in the dispute should be entitled to unemployment benefits.

In the example we cited where there are two or more unions representing employees in an employer's plant, an increase in wages or fringe benefits or improvements in other conditions of employment negotiated by one union inevitably leads to a comparable increase for other employees. Many employers have a policy that increased wages negotiated in a union bargaining agreement will be followed by an increase for the office, clerical, and supervisory employees. Because of the domino effect of substantial increases granted to the members of one union at the bargaining table the distinction between those "interested" and those "not interested" is a very difficult line to draw. The Ohio law avoids this difficult problem by denying benefits to all those employees, of the same employer who is a party to the dispute, whose unemployment is due to the dispute.

We believe the decision of this court in the case of *Sproles v. Benford*, 286 U.S. 374 (1932) is responsive to this question. There it is stated:

"To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.

"When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is intended to form its own judgment and its action within the range of discretion cannot be set aside because compliance is burdensome." *Standard Oil Co. v. Marysville* 279 U.S. 582; *Price v. Illinois* 238 U.S. 446; *Hudachick v. Los Angeles* 239 U.S. 394; *Euclid v. Ambler Realty* 272 U.S. 365; *Zahn v. Board of Public Works*, 274 U.S. 325.

It has been noted that the labor dispute disqualification provision in the Ohio law was amended effective December 2, 1975. (Sec. 4141.29(D) R.C.)

As amended, benefits are still denied to all employees whose unemployment is due to a labor dispute and who are employed at the same establishment at which the labor dispute exists, (regardless of participation, interest, etc.). However, if an employee is employed at some *other* establishment of the employer and if it can be shown that such employee was not financing, participating in, or directly interested in such dispute he will not be denied benefits because of the dispute.

This is the first time in the long history of this provision that the Ohio legislature, in exercising its choice of beneficiaries, has decided not to deny benefits to employees in a different establishment than the one where the dispute exists, based upon lack of interest, participation or financing.

For the above reasons the question presented here is not moot. The decision will affect all those involved

in this case whose benefit rights were determined under the law prior to its amendment, as well as those claims under the amended law who are employed in the same establishment where the labor dispute exists whose unemployment is due to the dispute but who are not participating, interested in, or financing the dispute.

D. INCREASED BENEFIT PAYMENTS TO A CLASS OF BENEFICIARIES NOT NOW CONTEMPLATED IN THE PROGRAM WILL FURTHER JEOPARDIZE THE SOLVENCY OF THE OHIO TRUST FUND.

The Ohio Unemployment Trust Fund has remained solvent during the some forty years of its existance.

The state legislature has broadened the coverage of its program from employers of 8 or more employees in 1936 to one or more today. It now covers some 3.7 million workers compared to 1.3 million at the beginning. Maximum weekly benefits have been increased from $15 in 1939 to $150 today and the duration from 16 weeks to 26 weeks, plus another 13 weeks during periods of high unemployment on a 50-50 financing basis with the federal government.

As the state program has become more comprehensive so has the need for increased payroll taxes. Tax rate schedules were adjusted upward from a top of 2.7% in 1939 to 4.8% today and the tax base increased from $3,000 in 1940 to $4,200 today.

About $698 million of benefits were paid out in 1975 and $180 million collected in contributions with a balance at January 1, 1975, of $294 million, and $238 million on September 30, 1976.

These facts are relevant here, because if large amounts of benefits are paid out to a class of workers not now contemplated in the program, the solvency of

the state fund will be in even greater jeopardy. It may be noted that 21 other states have been forced to borrow from the federal government an estimated $3.2 billion during 1975 and 1976 of which $2.9 billion came from advances from the Federal General Revenue Fund. (U.D. Dept. of Labor Unemployment Insurance Service).

A state's policy of maintaining an equilibrium between insured risks and the amount of premium (contributions) to the fund has been recognized by this court in *Geduldig v. Aiello*, 417 U.S. 484, 94 S. Ct. 2485, (1974).

We have yet to note the possible unfair and unjust consequences which might result from excessive charges to an employer's merit rating account if benefits were to be paid to large numbers of his employees who might become unemployed due to a labor dispute.

The Ohio law provides at Sec. 4141.25(C) for the establishment of a "mutualized account" which, among other items, is charged with the excess negative balance of an employer's experience rating account in excess of 5% of his average annual payroll. Annually the Administrator totals the charges and credits to this account and assesses a uniform tax against all subject employers in an amount necessary to balance this account. This mutualized tax (sometimes referred to as the socialized tax) is added to the tax rate computed on the basis of the employer's own unemployment experience.

It becomes readily apparent that if large deficits are created in employer accounts because of benefits for unemployment due to a labor dispute they will increase the charges to this "mutualized" account and be paid by every other covered employer in the state through

an increase in the mutualized tax, a very unfair and undesirable result — the real "innocent bystander."

Carried a step further, if the floodgates are opened to this type of unemployment benefits, employers' costs will be increased, not only from unwarranted increases in labor rates resulting from loss of employer strength at the bargaining table, but also from payments for "non production" in the form of increased unemployment benefits.

Indubitably prices are increased (if the employer is to stay in business) which fuels the fires of inflation — without doubt our most serious economic problem today.

If the structure of the state unemployment compensation programs is undermined by repeated interference by the federal government in their administration, then it will surely crumble and fall.

If the decision of the lower court is allowed to stand, it will have repudiated the principles enunciated by Mr. Justice Cardozo in the majority opinion of this court in the *Steward Machine Co.* case and by Mr. Justice Stone in the *Carmichael* case. Both of these decisions strongly emphasized the states' right of choice of beneficiaries in their unemployment programs, without interference or coercion by the federal government.

If the state is now coerced into paying benefits to the class of employees involved herein, clearly not intended by the legislature, then other classes will surely fall and further encroachments on administrative functions will follow, signalling the end of state administered laws as they are constituted today. It would justify the apprehensions of two Justices of this Court in their dissents in the *Steward Machine Co.* case.

Mr. Justice Sutherland stated:

> "If we are to survive as the United States, the balance of powers of the nation and those of the states must be maintained. There is grave danger in permitting it to dip in either direction, danger — if there were no other — in the precedent thereby set for further departures from the equipoise. The threat implicit in the present encroachment upon the administrative functions of the states is that greater and greater encroachments . . . will follow."

And in the eloquent words of Mr. Justice McReynolds:

> "The doctrine thus announced and often repeated, I had supposed was firmly established. Apparently the States remained free to exercise governmental powers, not delegated or prohibited, without interference by the Federal Government through threats of punitive measures or offers of seductive favors. Unfortunately, the decision just announced opens the way for practical annihilation of this theory; and no cloud of words or ostentatious parade of irrelevant statistics should be permitted to obscure this fact."

CONCLUSION

The decision of the lower court is the only Federal Court to our knowledge which has even questioned the constitutionality of the labor dispute disqualification provision in the Ohio law.

A law containing this exclusion and many others, was held constitutional by this court in *Carmichael v. Southern Coal Co.*, supra. Evidence that this court has continued to hold this view is found in its denial of Certiorari in the *Abernathy* case in which the North Carolina Supreme Court held constitutional a provision in its law denying benefits under the exact circumstances now at issue in the Ohio law.

The decision of the Three Judge District Court under appeal here, was decided on the basis of a jurisdictional hearing. There was no opportunity for the employers, the state or other interested parties to present evidence or submit briefs on the subject of the legitimate interest being served the state by the labor dispute disqualification, which interest the lower court held was lacking.

We submit that the choice of beneficiaries provided in Section 4141.29(D)(1)(a) is a reasonable exercise of the police power of the state and serves a legitimate state purpose.

We further submit that the payment of benefits to a class of beneficiaries, not contemplated by the legislature, will further jeopardize the solvency of the Ohio Trust Fund; may cause deficits in employer merit rate accounts necessitating undue increases in his payroll tax and the mutualized tax of all covered employers.

The decision of the Three Judge District Court should be set aside and the injunction against the Administrator and the Board of Review vacated.

Respectfully submitted,

WALTER J. MACKEY
1480 West Lane Avenue
Columbus, Ohio 43221
Attorney for
Republic Steel Corporation